NO. 6439

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETER SEKINOFF,

Appellant,

vs.

N. P. SEVERIN COMPANY, a partnership, of which N. P. SEVERIN and A. N. SEVERIN are members.

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE, AT JUNEAU

BRIEF OF APPELLEE

H. L. FAULKNER,
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BRIEF FOR APPELLEE

Upon Appeal From the District Court of the United States for the Territory of Alaska, Division Number One.

STATEMENT

This is an action brought by Peter Sekinoff, appellant, who was the plaintiff in the court below, and who will be hereafter referred to in this brief as the plaintiff, against the N. P. Severin Company, appellee,

defendant in the court below, who will be referred to herein as the defendant. The action is brought under the provisions of Chapter 25 of the Laws of Alaska of 1929, commonly known and referred to as the "Alaska Workmen's Compensation Act."

The suit is brought under the provisions of Section 1 of said Act, found in the last two paragraphs of said Section 1 of the act, commencing at the middle of page 53 of the Laws of Alaska of 1929. The part of Section 1 upon which the suit is founded, reads as follows:

> "Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars ($7,200.00).
>
> "To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars ($7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury

would be such as to reduce his or her earning capacity twenty-five (25%) per centum, he or she would be entitled to receive One Thousand Eight Hundred Dollars ($1,800.00) it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that twenty-five (25%) per centum does to one hundred (100%) per centum. Should such employee receive an injury that would impair his or her earning capacity seventy-five (75%) per centum, he or she would be entitled to receive Five Thousand Four Hundred Dollars ($5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that seventy-five (75%) per centum does to one hundred (100%) per centum."

The amended complaint alleges that the injuries complained of are permanent and have resulted in the total loss of the left eye and injury to the right eye, thereby resulting in the destruction of 50% of plaintiff's earning capacity. (See Par. II Amended Complaint, Tr. p. 2).

The defendant, by its answer denies that plaintiff received any personal injuries while employed by defendant.

Upon the issues as made by the amended complaint and the answer, the case was tried in the District Court before a jury, and, on the completion of the evidence, the court directed a verdict in favor of the defendant, and judgment was entered accordingly; and it is from this judgment that plaintiff has appealed. The sole assignment of error is that the

court erred in directing the verdict in favor of defendant and in entering judgment on said directed verdict.

POINTS, ARGUMENTS AND AUTHORITIES

The defendant contends:

FIRST: That since the action was brought under the last two paragraphs of Section 1 of the Compensation Act, and compensation was sought for loss of earning capacity, it was incumbent upon plaintiff to prove such loss; and that there was absolutely no evidence as to plaintiff's earning capacity, and nothing upon which a jury could be asked to compute the compensation due the plaintiff if they found he was injured as alleged; and,

SECOND: That there was no evidence of permanent injury,—the testimony showing only that plaintiff had a cataract in his left eye.

I.

THERE WAS ABSOLUTELY NO EVIDENCE OF LOSS OF EARNING CAPACITY

The sole testimony of plaintiff regarding earning capacity is as follows:

In answer to question of his counsel on direct

examination, he stated that during the last year he had been able to work and had worked in Ketchikan for a short time, but that he was not able to hold his job. (Tr. p. 9).

Again on cross examination he testified that after he brought the suit he went to Ketchikan and worked for some time in the saw mill. (Tr. p. 12).

Again in rebuttal on cross examination he stated, in answer to a question as to what he was doing in Ketchikan last summer, that he worked in the saw-mill. (Tr. p. 39).

It is true there are certain statements through the record showing that in years past he worked as a miner, but not a word anywhere as to his earning capacity, nor the kind of work he was accustomed to do or generally perform or had the ability to perform. He said he could not hold the job in Ketchikan; but he does not say what the job was nor what he earned nor why he could not hold the job. There is not a word anywhere about earnings nor earning capacity, either before or after the alleged accident; and nowhere does he state anything upon which a court or jury could base a finding as to any decrease or impairment of earning capacity.

Under the section of the compensation act applicable to this case, there must be partial permanent disability in order to justify a recovery, and this disability is measured in terms of loss of earning

capacity. This section of the statute was enacted to provide compensation in those cases where the employee receives an injury, which is permanent in character, and which does not come wholly within any of the specific cases for which provision is made in the preceding part of Section 1, which contains the schedules for loss of hand, loss of eye, loss of arm, finger, thumb, toe, etc. It is not walking capacity, lifting power nor vision that is involved, but loss of earning capacity. There is not one scintilla of evidence as to what plaintiff's earning capacity ever was. He simply tells us that he worked in Ketchikan in the sawmill after the alleged accident, and that he was not able to hold his job. So far as the record goes we are not informed of the nature of his job, whether it was one for which he was adapted or qualified, whether it was laboring work, clerical work or an executive position; and he does not say whether he lost it because of physical inability to hold it, or whether it was for some other reason.

> "Earning capacity does not necessarily mean the actual earnings that one who suffers an injury was making at the time the injuries were sustained, but refers to that which, by virtue of the training, experience and business acumen possessed, an individual is capable of earning."
>
> (*Words and phrases*, 3rd Series, Vol. 3, p. 115.)
>
> (*Texas El. Ry. vs. Worthy*, 250 S. W. p. 710.)

The general rule is that:

> "The measure of damages for impairment of earning capacity may be stated to be the difference between the amount which plaintiff was capable of earning before his injury and that which he is capable of earning thereafter * * * "

(17 C. J. p. 897.)

Our compensation act establishes the measure of damages, or the measure of recovery, in cases of this nature, by fixing certain percentages of a lump sum which are proportioned to the percentage of loss of earning capacity. It may be conceded that such a percentage could never be established to a mathematical certainty, but we submit that there must be some evidence upon which the jury can base an award. There must be some testimony as to what the plaintiff was capable of earning before the injury, and testimony as to what he is generally capable of earning after the alleged injury, so that the difference between the two may be computed in order to find the percentage of the lump sum amount to which the plaintiff would be entitled.

> "Evidence from which the amount may be determined is essential. It is an award for impairment or destruction of earning capacity. An award cannot be made from mere conjecture or without proper data furnished as evidence, although the evidence need not be clear and indubitable to entitle it to go to the jury, and the

law exacts only the kind of proof of which the fact to be proved is susceptible."

(17 C. J. p. 900).

Under the text in 17 C. J. p 900, quoted above, is a note which cites the case of *Olin vs. Bradford*, 24 Pa. Super, p. 7-10, which reads as follows:

"It is too well settled to require the citation of authorities, that such loss cannot be considered as an element of the measure of damages in the absence of evidence from which its pecuniary extent may be estimated. Even if we presume an earning capacity in a person of ordinary physical and mental powers, we cannot presume its quantum pecuniarily; and hence, without evidence on this point, there is no ground from which the pecuniary damage arising from its loss or impairment can be determined."

"Whether an employee's wages will be increased or diminished in the future, or whether he will certainly die sooner or later, is not fact of positive proof, but no sound rule of right and justice will permit a jury in assessing damages to be paid by one person to another, as compensation for pecuniary loss, to reach a conclusion of the amount to be paid from mere conjecture, or without regard to proper data furnished as evidence."

(*Seaboard Mfg. Co. vs. Woodson*, 11 Southern, 733).

"The general rule governing is that the evidence must be such as will enable the jury to

deduce a rational inference therefrom with respect to the matter involved."

(*Kerr vs. Frick*, 100 Atl. p. 135, 255 Pa. p. 452.)

II.

THERE WAS NO EVIDENCE THAT THE ALLEGED INJURY, IF THE PLAINTIFF RECEIVED SUCH IN THE EMPLOY OF DEFENDANT, WAS PERMANENT IN CHARACTER WITHIN THE MEANING OF THE STATUTE.

The plaintiff alleged in his complaint that while he was employed shoveling dirt, he was "hit by some foreign substance in his left eye, the actual substance being unknown to this plaintiff." (See Amended Complaint, Par. II).

Upon the trial he testified that something jumped and hit him in the left eye (Tr. p. 8). He further testified that he could see "pretty good" when he started to work for defendant, and that at the time of the trial he could see "nobody now" with the left eye. (Tr. p. 9).

Four doctors examined his eye at different times between the date of the alleged accident and the trial, including one eye specialist. These doctors, namely, Drs. Dawes, Council, Pigg and Southwell, testified at the trial. This was all the medical testimony intro-

duced. Dr. Dawes testified for the plaintiff, and the other three doctors for the defendant. None of them found any evidence of any injury to the eye.

Dr. Dawes testified that plaintiff had a cataract on the left eye. He knew nothing about the cause of the cataract except from the statement of plaintiff. (Tr. pp. 13-14); and that the cataract was ripe and ready for removal, and that if removed plaintiff could see with the left eye with the use of glasses. (Tr. p. 14).

Dr. Council said he had a cataract (Tr. p. 24); that the cataract could be removed, and that the operation, while delicate, was comparatively simple, with little reason to fear (Tr. p. 25); and that if the cataract were removed vision would be restored (Tr. p. 26).

Dr. Pigg stated that he had treated Sekinoff for both eyes ever since the year the cold storage plant was built (Tr. p. 29), (this was in the year 1927,—See testimony Hector McLean, Tr. p. 36); and that he had a cataract on one eye which was coming in 1927. (Tr. p. 29).

Dr. Southwell testified that he examined the plaintiff a few days before the trial in his office and that he found a cataract in the left eye (Tr. p. 33). He further testified that he found no evidence of a blow, puncture or scar which would cause traumatic cataract. (Tr. p. 33). He also testified that

the cataract could be removed by an operation which was not serious, and vision could be restored by the use of an optic lense. (Tr. p. 34).

This is all the testimony bearing on the permanency of the disability, and it will be seen from an examination of the testimony that no witness on either side testified that there was a permanent loss of vision in the left eye in any degree. It may be conceded that there would be some permanent impairment of vision even if the cataract were removed, but there is nothing upon which to base the measure of the loss of vision.

It must be remembered that plaintiff does not sue for the loss of an eye. He sues for decreased earning capacity, alleged to have been caused by the injury to the left eye and consequent strain on the right eye. The compensation act provides for payment of compensation for the loss of an eye, which, of course, means the total loss of the eye, or the use of the eye, where the same is permanent. It provides nothing for the partial permanent loss of vision; and if a man suffers a permanent partial loss of vision, and such permanent partial loss of vision impairs his earning capacity, he may be entitled to recovery under the provisions of the last two paragraphs of Section 1 of the Compensation Act hereinabove set forth. In other words, if a man loses 90% of the vision of one eye, he has not totally lost the eye nor the total use of the eye, but it may be that he would not be denied

some compensation under the circumstances; and an examination of the act discloses the fact that his compensation would have to be based upon the provisions of the last two paragraphs of Section 1 of the act: that is to say, upon decreased earning capacity, unless, of course, he should lose so much of the sight of the eye as to be considered for all practical purposes, the loss of the eye. In that case, of course, he would undoubtedly be entitled to be paid the amount provided for the loss of an eye.

However, as I have stated before, the plaintiff in this case has sought to recover for loss of his earning capacity and he has introduced no evidence bearing on such loss. If we were to take it for granted, without evidence, that the permanent partial loss of the vision of the eye might be considered in some degree impairing his earning capacity, it would certainly at least be necessary for him to prove the extent of the permanent impairment of vision,—approximately at least.

The testimony shows only that the plaintiff has a cataract on his left eye. It is true that Dr. Pigg testified that this cataract was not caused by any injury received while in the employ of the defendant, but that it had been present for two or three years before the date of the alleged accident (Tr. pp. 29-30); but aside from this testimony, the only evidence in the case is that there is a cataract on the left eye; and, conceding for the purpose of

argument that this cataract was caused by the accident complained of, still there is no evidence upon which a verdict for compensation could be based.

The only medical testimony bearing upon the point is to the effect that a cataract can be removed by an operation which is simple and not dangerous, and that if it is removed vision is restored, if not for all practical purposes, at least to a more or less extent. This would, of course, depend upon the age of the patient and the length of time perhaps the cataract had been present. We submit that it was the duty of the plaintiff before seeking compensation from the defendant, to have taken the necessary steps to have the cataract removed and the approximate extent of the impairment of vision determined, with a reasonable degree of certainty, before he would be entitled to compensation. There are many cases which hold that it is the duty of an injured employee to do this.

In the case of *Cline & Company xs. Studebaker Corporation*, L.R.A. 1916 C. p. 1139, 155 N. W., p. 519, the supreme court of Michigan held that it was the duty of the employee to minimize the injury as much as he reasonably could. In that case the court set aside an award based upon the finding that the employee had lost 90% of his sight, when, by the use of proper glasses, the loss could have been reduced to 50%.

In the case of *Joliet Motor Company vs. Industrial Board of Illinois*, 117 N. E., p. 423, the court held that the employee could not recover for the complete loss of his left eye due to a cataract which he ascribed to an injury he had received, where the evidence showed that there was a good probability of recovering normal vision for ordinary purposes, by the removal of the cataract. The claimant refused to have the cataract removed, and the court said that if the operation should be had and should prove unsuccessful, then the employer would be liable for the loss of the sight of the eye as well as for the surgical and hospital services necessary for the operation; but if the operation were successful, the employer's liability would be reduced.

See also:

Schiller vs. B. & O. Railroad, (Md.) 112 Atl. p. 272;

Myers vs. Wadsworth, (Mich), 183 N. W., p. 913;

Jandrus vs. Detroit Steel Products Co., (Mich.) 144 N.W., p. 563;

Lesh vs. Ill. Steel Co., (Wis.) 157 N.W. p. 539.

The Alaska Compensation Act makes no provision for requiring the employee to submit to an operation, and the plaintiff testified that the operation would cost $250. There is no testimony in the

case that he ever applied to the defendant for the operation. On the contrary, Mr. Curtiss, the defendant's superintendent and the man in charge of the work in which the plaintiff alleges he was injured, testified that he never applied to him for medical attention, and that he had no intimation of the claim for compensation until the suit was filed. (Tr. pp. 22-23).

Section 2 of the Alaska Compensation Act, found on page 54 of the laws of 1929, provides as follows:

> "Section 2. And in addition to the compensation for injured employees in this Act otherwise provided, the employer shall furnish to and for each injured employee such reasonably necessary medical, surgical and hospital treatment, including necessary transportation to and from hospitals, as may be required by reason of the injury, for a period of not exceeding one year from and after the date of injury to any such employee; and the employer in order to create a fund out of which the expense of such treatment may be paid, may charge against and deduct from the wages of each employee, as and when the same are paid, the sum of not to exceed Two Dollars and Fifty Cents ($2.50) per month; provided that not more than one half of the monthly rate may be deducted unless the employee be employed for more than fifteen days the money so deducted and withheld by the employer shall be kept by him in a separate fund and used only to cover the services and treatment in this section provided, and if the fund so created be insufficient, such deficiency as may reasonably arise, shall be paid by the employer without any charge therefor against the

injured employee or any other of the employees; and the employer shall have the exclusive right, and it shall be his duty to select and furnish the necessary physicians, surgeons and hospitals and to that end he may enter into all necessary contracts with such physicians, surgeons and hospitals for the furnishing of such services and treatments. Nothing contained in this section shall be construed to limit the right of the employee, to provide in any case, at his own expense, a consulting physician or any attending physician whom he may desire. The fund hereby created by deductions herein allowed to be made by the employer from the wages of employees shall be and the same is hereby made a trust fund which can be used only for the purposes herein set out. Whenever any employer shall cease his business or operations and go out of the business in which such employer had been theretofore engaged, any part of the fund created by this section and remaining in the possession of such employer shall, by the employer, be paid to the Territorial Treasurer and by him covered into the general territorial funds."

Under this section therefore, if the plaintiff was injured in the employ of defendant, the defendant was liable for the medical, surgical and hospital treatment, which would include the operation for the removal of the cataract; but the defendant could not very well be charged with having this operation performed, unless the plaintiff had applied to it for the operation, or at least informed the defendant that the operation was necessary. This was not done.

It will be seen that Section 2 provides that the

employer may deduct a sum not to exceed $2.50 per month from the employee's wages in order to create a medical and hospital fund; but there is no testimony in the case that the defendant did this; and, in any event, the compensation act makes the defendant liable for expenses of the operation in case of injury.

One of the leading cases on this point is the case of *Strong vs. Sonken-Galamba Iron Co.*, decided by the Supreme Court of Kansas and found in 198 Pac., p. 182. This case is squarely in point for the reason that the Kansas statute, like the Alaska statute, makes no provision for compelling the injured employee to submit to an operation in order to minimize his injuries and decrease his disability. The court held, that statute or no, it was the employee's duty to submit to the operation. The court said:

> "It was vigorously contended by appellant that one should not, as a condition precedent to payment of continued compensation during disability, be required to submit to an operation, the result of which might be fatal, even if such result is so unlikely as to make the danger practically negligible. To support this contention he has cited three authorities, all being New Jersey cases. (Citing the three cases.)
>
> "The overwhelming weight of authority is opposed to this view, holding that a man cannot continue to receive compensation and at the same time refuse to submit to proper medical or surgical treatment such as an ordinarily rea-

sonable man would submit to in like circumstances.

"The proposition that an applicant under the provisions of this humane law, may create, continue, or even increase his disability by his willful, unreasonable, and negligent conduct, claim compensation from his employer for his disability so caused, and thereby cast the burden of his wrongful act upon society, is not only utterly repugnant to all principles of law, but is abhorrent to that sense of justice common to all mankind."

In the case of *Mt. Olive Coal Co., vs. Industrial Commission*, 129 N. E., p. 103, (Ill.), the operation to the employee's wrist, which, it was contended would restore its use, was a simple one, unattended with danger. The continuance of his total disability was held due to his unreasonable refusal to submit to an operation. The court said:

"It is conceded that there is no power in the industrial commission or elsewhere to compel defendant in error to submit to an operation; but, on the other hand, it must be conceded that whether the loss of 80% of the use of the right hand of defendant in error is attributable to the accident or to the refusal of defendant in error to have the adhesions in the tendons forcibly broken up is a question for the commission, in the first instance, to determine. The uncontradicted evidence in the record shows that there was no possibility of danger to the defendant in error from the operation. It is such an operation as any reasonable man would take advantage of, if he had no one against whom he could claim compensation. A reasonable and

> salutary rule, which has been followed by the American and English courts of last resort, is this: 'If the operation is not attended with danger to the life or health or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employer from the obligation to maintain him'."

(See also *Joliet Motor Co. vs. Industrial Board*, 117 N.E., 423).

A recent case decided by the Circuit Court of Appeals for the Eighth Circuit, is the case of *U. S. Smelting, Mining and Refining Co. vs. Evans*, 35 Fed. (2nd Series), p. 460. In that case the Utah Industrial Commission had allowed a claimant compensation for total disability where the sight of the left eye was permanently lost, and the sight of the right eye reduced to less than 10% of normal vision without glasses,—normal near vision and limited distant vision with glasses. The appellant employer waived its right to seek a review of the findings of the commission in the Supreme Court of Utah, and applied to the Federal District Court for an injunction enjoining the enforcement of the Commission's award. The Federal District Court dismissed the case and the Circuit Court of Appeals affirmed the District Court and held that the Federal courts were without jurisdiction; although the Commission had acted mistak-

enly. The Circuit Court of Appeals in that case said:

> "We may assume, *and it is our opinion,* from the cases cited, that if the case before the Commission might be reveiwed on the merits in the Federal Courts, appellee, having only a partial loss of vision, which was subject to correction by the use of glasses, did not sustain a total disability." (italics ours)

See also *Moran vs. Oklahoma Engineering and Machine Boiler Co.* 214 Pac. 913 (Okla.); *Crane Enamelware Co. vs. Dotson,* 277 S.W. 902.

The general rule seems to be that if the operation is a major operation or attended with danger, or if the results are doubtful, the employee is under no obligation to submit to it; but, if the operation is a minor one, simple and not dangerous, as all the testimony in this case shows the operation in question to be, then it is the duty of the employee to have the operation performed.

It is argued by appellant that the employer in this case never tendered an operation to the plaintiff. However, under the Alaska statute, if the employee was injured the employer became liable for the expenses of the operation, and, where the employee did not make application to the employer nor inform the defendant that he had a cataract and that an operation was necessary, then, in the very nature of things, the employer could not have tendered the

operation; and it was the duty of the plaintiff to have either had the operation performed by his own physician before he brought suit, or to have requested the defendant to have had it performed for him. He did not do this. It is true that Dr. Dawes sent a note, the exact contents of which have not been disclosed, to the "boss" (whoever that might have been), stating that the eye needed attention (Tr. p. 13-14). This note was afterward destroyed by Dr. Dawes, (Tr. p. 14), and the uncontroverted testimony of the defendant is that it was not notified of any alleged accident, nor claim on the part of the plaintiff until the suit for compensation was filed and the papers served on the superintendent. (Testimony of Curtis, Tr. pp. 22-23).

APPELLANT'S AUTHORITIES

Atlantic Oil Producing Co. vs. Houston, 298 Pac. 245.

In that case there was no question as to the total permanent loss of the left eye, for the eyeball had been removed, and the question was as to the degree of injury to the right eye caused by infection resulting from the injury and loss of left eye. That case differs from this case because here, we contend there is no evidence of total permanent loss of the eye nor of the degree of partial permanent loss, if any.

Moran vs. Oklahoma Engineering and Machine and Boiler Co., 214 Pac. 913.

In that case the claimant was receiving compensation in weekly payments as provided by the Oklahoma statute. The insurance carrier received permission from the State Industrial Commission to have a further medical examination made, with the result that two doctors recommended a certain operation as an experiment, after which if this was not successful they proposed a further major operation. The employee consented to this but afterward changed his mind and compensation was suspended on that account. However, there was no assurance in that case that the operation proposed would work a cure, nor that it was simple or safe and as has been stated it was to have been largely in the nature of an experiment. The court properly held that suspension of compensation under such circumstances was not justified.

Lesh vs. Illinois Steel Company, 157 N. W. 539.

This case must have been cited by appellant inadvertently for it supports our position and has been hereinabove cited by us.

Gildersleeve et al. vs. Industrial Commission et al. 295 Pac. 1033.

This is a California case brought under a statute entirely different from the Alaska statute. The last

paragraph of that decision is the only portion of it which is pertinent here; and that paragraph reads as follows:

> "Petitioner also seeks a reduction of disability indemnity under Sec. 11 (e) of the Act (St. 1917, p. 842), on the ground that the disability now existing was caused or aggravated by unreasonable refusal to accept proper medical treatment. This issue like the first is determined by the finding of the commission that there was not a sufficient tender of such treatment."

The California act apparently provides for a certain procedure in such cases, which provision is not found in the Alaska act. This case is not in point because the appellee here is not seeking a reduction of disability indemnity nor a discontinuance of payments nor anything of the sort. In that case the injury was admitted. In this case appellee's position is that Sekinoff was not injured in their employ; and the burden was on him to prove, first: that he was injured in Severin's employ, and second: that the injury was permanent, and third: the degree of permanent disability, whether that be 50% loss of earning capacity or total permanent loss of eye. Since this burden was on him it was incumbent upon him to properly treat the cataract so that when he came into court he would be able to show the degree of permanent injury. Upon the trial of the case his position was somewhat like that of a man having a broken leg received in the course of his employment, who would come into court the next day and

show that the leg was useless because of the fracture without any showing that he had ever attempted to have the bones set and without any showing that the condition of the leg was permanent.

O'Neill vs. Industrial Accident Commission, 266 Pac. 866.

The same argument applies in this case as in the Gildersleeve case, supra.

Kingsport Silk Mills vs. Cox, 33 S. W. 2nd 90.

In that case the physicians who testified differed in their opinions as to the probable result of the operation. In this case, however, there is no conflict in the medical testimony. All the doctors on both sides said an operation for removal of the cataract was simple and not dangerous and that it would restore sight to a certain degree which, of course, could not be computed until after the operation; in fact, Dr. Council testified that if the cataract were removed he would already have vision and could see at a distance fairly well. (Tr. p. 26).

Moran vs. Oklahoma Engineering Co. et al., supra.

It is suggested by appellant on Page 12 of his brief that the burden of proof is on the employer to establish all facts as to whether or not refusal to submit to an operation and treatment was unreasonable, etc. We repeat that in this case there was no

conflict of the testimony. There was no testimony showing the degree of permanent injury, if any.

Consolidated Lead & Zinc Co. vs. The State Industrial et al., 295 Pac. 210.

This case is not in point for the reason that we do not question the general rule that if the operation in question is attended with any risk, there is no obligation on the part of the employee to submit to it; but we do contend that the rule is different where all the testimony shows an operation to be simple and not dangerous.

McNamara vs. Metropolitan State Railway Co., 114 S. W. 50.

This does not appear to be a compensation case and an examination of the opinion of the court discloses the fact that the operation there involved was described as somewhat dangerous.

Graf vs. National Steel Products Co., 38 S. W. 2nd, 518.

That case differs from this case because there the facts established were that without glasses the employee had lost 94.6% vision and with glasses 20.8%. The statute in that case was materially different from the Alaska statute; and apparently provided compensation for partial loss of a member. No such provision is made in the Alaska Statute and compensation is awarded here either for total perma-

nent disability or total partial disability based on a percentage of earning capacity, or the loss of a member. Plaintiff here proved no loss of earning capacity, nor did he prove loss of a member within the meaning of the Alaska statute; and even if the Alaska statute had provided for partial permanent loss of a member, no evidence was introduced which would support such an award.

Globe Cotton Oil Mills vs. Industrial Accident Commission, 221 Pac. 658.

In that case again the compensation depended upon the degree or extent of the loss of vision and this degree had been determined and found to be 1/100 vision without glasses, and practically normal with glasses; and under the statutes the claimant was awarded 19½% total disability. We may concede for the sake of argument that if appellant had proved that his vision was so far destroyed as to leave him only 1/100 of normal vision he would be entitled to compensation for the loss of the eye even though the statute makes provision only for total loss; but there is nothing in the record upon which any court or jury could base such an award.

Juergens Bros. Co. vs. Industrial Commission, 125 N. E. 337. (Ill.)

In that case a cataract had been removed from claimant's eye and the testimony showed an estimated loss of three-fourths of normal vision with

lenses. In the instant case since the cataract was not removed no one knows what the vision would be, either with or without glasses.

Stefan vs. Red Star Mill & Elevator Co., 187 Pac. 861.

That case is not in point for the reason that on account of the injury to claimant's eye the vision of both eyes was so distorted that the injured eye had to be kept covered in order that he might see from the other eye and there was no known remedy for this condition. The court held that this was equivalent to the permanent loss of the use of the eye and we agree with the court.

Butch vs. Shaver, 184 N. W. 572.

There again the cataract had been removed and the exact condition of the eye determined so that a finding could be made by the commission under the Minnesota law so that the matter was not left to speculation.

Johannsen vs. Union Iron Works, 117 A. 639.

In that case claimant was awarded compensation for loss of one-third vision of eye and was awarded compensation on a weekly wage basis for so many weeks, under the provisions of the statute. In that case the degree of loss had been determined so that the commission had the correct basis for its award,

but in the instant case no basis was given for the computation of compensation.

Winona Oil Company vs. Smithson, 209 Pac. 398.

That case holds that where claimant loses all practical use of an eye he should receive compensation even if he can continue work. This might be true under the Alaska statute, and if the testimony had shown plaintiff to have lost all practical use of his eye permanently he might be entitled to compensation for loss of an eye.

Marland Refining Company vs. Colbaugh, 238 Pac. 831.

In that case claimant lost 60% of the use of the eye. This fact was found by the commission. The Oklahoma statute made specific provision for such percentages of loss, thereby differing from the Alaska act, which provides only for the total permanent loss of the eye, other injuries being compensated for on the basis of degree of loss of earning capacity.

Alessandro Petrillo Co. vs. Marioni, 131 At. 164.

That was a Delaware case and the statute there provided for compensation for loss of fractional part of vision of eye and the commission awarded compensation on that basis under the statute after the percentage of loss had been determined.

Traveler's Insurance Co. vs. Richmond, 284 S. W. 698.

There also the degree of total permanent loss of vision had been determined.

Suggs vs. Ternstedt Manufacturing Co., 206 N. W. 490.

In that case again the cataract had been removed before the compensation was awarded and the extent of total disability or impairment of vision had been ascertained.

It will therefore be seen from an examination of the decisions upon the question as to whether or not the employee is bound to submit to an operation to lessen his disability, that there is some conflict of authority, although we contend that the overwhelming weight of authority is that where the operation is simple and not dangerous it is the employee's duty to submit to it and thereby lessen his disability, if possible.

Aside from this, however, we contend that there is no evidence in this case of the total permanent loss of the eye.

There is also a conflict of authority upon the point as to whether the compensation is to be fixed on the degree of loss with glasses, or without, even in those states where the statutes provide for compensation for partial loss of vision. The Circuit

Court of Appeals for the 8th Circuit in the case of *U. S. Smelting, Mining, and Refining Company vs. Evans, supra,* holds that a partial loss of vision with glasses would not be considered total loss of the eye. However, aside from that question we have here a case in which there is no evidence as to the extent of the total permanent loss. We have no basis upon which to compute the extent of the impairment of vision, nor what vision will remain permanently. Sekinoff showed nothing except that he had a cataract in the left eye, which he seems to insist on keeping. We can find no case where under such circumstances any claimant has been awarded compensation.

CONCLUSION

The plaintiff sued for compensation based on 50% permanent loss of earning capacity. He introduced no testimony tending to show any loss of earning capacity. The only testimony was that after the alleged accident he went back to the defendant company for employment but was told there was no place for him, (Tr. p. 9). He does not say why there was no place for him and certainly there is no hint that it was because of his physical condition. The natural inference would be from all the testimony that since plaintiff had been employed digging holes for the foundation of a building, in the very nature of things such work would be temporary only and would soon be finished. It is not as though he had

been employed in a manufacturing plant in a position which was a continuing one.

Having failed to introduce any testimony showing loss of earning capacity to support the allegations of his complaint he now contends that he should have been awarded compensation for the loss of the eye; and in support of such contention his only argument is that he had a cataract in the left eye at the time of the trial. There is no evidence that this cataract was caused by the alleged injury. All the doctors testified that there was no evidence of such a blow or wound on the eye which would ordinarily be necessary to cause a traumatic cataract; and all the testimony was to the effect that the removal of such a cataract as plaintiff had was a simple matter, and the record shows that the degree of loss of vision even if compensation could be based on any such degree short of total loss could not be computed. It was incumbent on the plaintiff to introduce testimony to prove either permanent loss of earning capacity in some degree or the total permanent loss of the eye. He did neither.

We, therefore, respectfully submit that the judgment of the District Court should be affirmed.

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